IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER NO.386 OF 2001
WITH
CIVIL APPLICATION NO.3773 OF 2002

For Approval and Signature:

HON'BLE MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HIRALAL GOPALDAS THAKKER

Versus

KANTILAL NATHALAL & ORS.

Appearance:

1. Appeal from Order No. 386 of 2001

MR. C.G. SHARMA for Appellant

MR. SURESH M. SHAH for Respondent No. 1

MR. MEHUL S. SHAH for Respondent No. 1

SERVED BY AFFIX.-(R) for Respondent Nos. 2-7

MR. NANDLAL THAKKAR for Respondent Nos. 8-8/B

UNSERVED-EXPIRED (R) for Respondent No. 9

MR. P.M. BHATT for Respondent Nos. 10-14

CORAM : HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 13/08/2004

COMMON ORAL JUDGEMENT

1. The appellant, original judgement creditor, has

approached this Court by this Appeal From Order being aggrieved of two orders passed by the learned Principal Judge, City Civil Court, Ahmedabad. One of these two orders is, Order dated 19th January, 1999 passed on Exh.1 and the Office Submissions made on 16th January, 1999 in Darkhast No.145 of 1996 and the other order is dated 15th October, 1999, which is passed below Exh.35 in the same Darkhast.

2. This Appeal From Order was filed beyond the period of limitation with Civil Application No.6070 of 2000 for condonation of delay, which was condoned by order dated 3rd September, 2001. Mr.M.S.Shah, the learned Advocate appearing for some of the respondents, submitted that, the appellant has laid the foundation of the appeal on misrepresentation, right from the beginning. In the Civil Application for condonation of delay, in paragraph-2, though Order dated 19th January, 1999 is mentioned, delay is explained by keeping the second order i.e. Order dated 15th October, 1999 in focus. Prima facie, it may appear to be a case of an inadvertent lapse on the part of the appellant and the learned Advocate, but then, on a little close scrutiny, it becomes clear that this is a case of willful misrepresentation.

3. Darkhast No.145 of 1996 is filed on 6th March, 1996 by the appellant-judgement creditor for enforcing the decree drawn on 7th March, 1986, that is, only after a decade.

In response to a query as to why `Darkhast' was filed after such a long time, the learned Advocate for the appellant replied that the period prescribed for filing `Darkhast' is 12 years and, therefore, it is not necessary to mention the reason before the Court. Not only that, the learned Advocate asserted that no note of the `absence of the reasons' be taken.

4. The appellant, while filing Darkhast No.145 of 1996, of his own substituted the `judgement debtors', than the one who were mentioned in the original decree. In the original decree, "Ambalal Shivlal Patel, Adult, Main Proposer, New Praful Park Cooperative Housing Society Limited-Proposed", was mentioned as defendant no.8. While in Darkhast, defendant no.8 is described as:

"New Praful Cooperative Housing Society Ltd.:

(a) Chairman - Pravinchandra Rilavchand Shah,
C/o.New Prakash Tea Depot, Opposite

Kalupur Post Office, Ahmedabad.

(b) Secretary - Prafulbhai Nandlal Thakkar,
Address: Nandanvan, Sushil Park, Near Sun Rise Park, Vastrapur, Ahmedabad."

The appellant also joined six other persons as defendants in Darkhast Proceedings without mentioning any reason as to why they are joined as defendants.

5. In this Darkhast proceedings, the first order was passed by the concerned Court on 10th April, 1996, which reads as under:

"Issue Notice against J.D. Nos.1 to 8 under O.21 Rule 34 of C. P. Code."

Thereafter, the matter was placed before the learned Principal Judge, Court No.1, City Civil Court, Ahmedabad, with the office submission dated 16th January, 1999. The learned Judge has passed the order as under:

"Vide Office Submission, dated 16th January-1999, Mtr.G.K.Dave, Deputy Registrar, has drawn by attention to the error apparent on the face of record while passing first order of issuing notice under Order-21, rule:34 of The Civil Procedure Code and has requested the Court to pass appropriate order, setting right the record in its proper perspective and in conformity with the decree passed by this Court.

The certified copy of the decree is produced at exhibit-2. From the decree, it transpires that judgement-debtors Nos.1, 4 & 5 have been ordered to execute the sale deed, transferring the right, title and interest of judgment debtors Nos.1 & 5 and judgment debtors Nos.1, 4, 5 & 8 have been directed to hand over vacant and peaceful possession of the suit premises. Despite this decretal order, the judgment creditor has prayed for appropriate directions against judgment debtors Nos.1 to 8, for execution of the sale-deed and for handing over vacant and peaceful possession of the property in question. Since the judgment creditor prayed for direction against defendants Nos.1 to 8, for execution of the document, the office also, inadvertently, without verifying the record, ordered for issue of notice under Order-21 : rule 34 of The Code of Civil Procedure against all of them. In fact,

notices should have been issued against judgment debtors Nos. 1, 4 & 5 only.

..... It also transpires from the decree that one - Ambalal Shivlal Patel, shown as defendant No.8, is the proposer of the proposed society New Praful Park Co.operative - Housing Society Ltd. Thus, the decree was passed against defendant No.8, in person, whereas in exhibit-1, the said society has been shown as judgment debtor No.8. Under these circumstances, such an order could not have been passed against judgment debtor No.8. Today, during the course of hearing, M/s. R.P.Patel and C.G.Sharma, the learned advocates for the judgment creditor, have fairly conceded about the error apparent on the face of record and have stated that the order of issuing notice under Order-21: rule-34 of The Code of Civil Procedure against defendant Nos.1 to 4, suffers from the error apparent on the face of record and the same is required to be reviewed. They have also stated that they would be moving appropriate Court in the matter for seeking appropriate orders against judgment debtors Nos.2, 3, 6 & 7, who are minors as well as judgment debtor No.8, who at the relevant time, was the proposer only and now that proposed society has already come into existence. Thus, it is evidently clear that the order of issuing notice under Order-21 : rule-34 of The Civil Procedure Code against judgment debtor No.8 suffers from the error apparent on the face of record and the inadvertent mistake committed by the office; therefore, the same is required to be reviewed. I, therefore, pass the following order:

`The order, dated 10th April-1996, issuing notices under Order-21, rule:34 of The Code of Civil Procedure, to judgment debtors Nos.1 to 8, is hereby reviewed, set aside and substituted as under:-

The notice under Order-21, rule:34 of The Civil Procedure Code is ordered to be issued against judgment debtors Nos.1, 4 & 5 only. The process issued against judgment debtors Nos.2, 3, 6, 7 & 8 is hereby set aside. It would be open to the judgment creditor to take appropriate steps for issuance of process against the said judgment debtors in accordance with law.'"

(emphasis supplied)

For the reasons best known to the appellant and his Advocate, the appellant did not do anything until Exh.35 was filed on 18th August, 1998. Mr.Shah, the learned Advocate appearing for some of the respondents, submitted that no such application was maintainable in view of the provisions of rule-9 of Order XLVII, which reads as under:

> "Bar of certain applications.---- No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained."
> (emphasis supplied)

A copy of Exh.36, dated 7th July, 1999, presented on the same day i.e. 18th August, 1999, is on record. The appellant-judgement creditor-decree holder has not set out any reason for which the delay was caused in filing that application. The appellant, after setting out the details of the case, has prayed for `review' of the order. In fact, in the prayer clause itself, it is mentioned that by order dated 16th January, 1999 (sic, 19th January, 1999), Order dated 10th April, 1996 is reviewed and, therefore, for the reasons set out in the application, Order dated 19th January, 1999 be reconsidered and reviewed. It is also prayed that the decision of the Court relating to `fair concession' by the Advocates, M/s.R.P.Patel & C.G.Sharma, may also be reconsidered.

This application was decided by Order dated 15th October, 1999. For the reasons mentioned therein, the learned Judge has declined to entertain the application. The order reads as under:

> "It is true that an order or judgement can be reviewed by the same Court; of course, within the arena of Order-47 - rule:1 of The Civil Procedure Code only. The application for review can be entertained only in case where the order suffers from (i) an error apparent on the face of record, (ii) acquiring some new evidence which, though in existence, could not be found at the relevant time despite due diligence and search and (iii) on any other sufficient ground. In my view, the judgment creditor has not satisfied any of these criteria; therefore, the application is not maintainable and cannot be entertained."
> (emphasis supplied)

6. Mr.Mehul S.Shah, learned Advocate for the respondent, submitted that though it is not specifically mentioned by the learned Judge that Exhs.35 and 36 were not maintainable, in view of rule-9 of Order-XLVII, because the order passed on 19th January, 1999 was on review of Order dated 10th April, 1996.

At this juncture, the aspect of `fair concession' being made by the learned Advocates at the time of passing of the order dated 19th January, 1999, for which a specific prayer was made in Exh.36-application, requires to be considered. The learned Judge has dealt with this aspect in a separate paragraph and has recorded that:

> "The application is filed by the judgment creditor, stating that though the advocates did not give consent, yet the Court has recorded their consent and passed the impugned order. In fact, in true sense, these facts should be within the personal knowledge of the advocates concerned and they are only the persons who can state these facts, but none of both the advocates on record has filed any affidavit, stating these facts, which in the facts and circumstances of this case, are within their special knowledge. In the result, even on merits, the ground canvassed is not satisfactory. Even existence of this ground is not established; therefore also, the application cannot be entertained. Apart from these facts, even if the matter is considered on merits, is barred by limitation as has been preferred after the period of almost seven months. Under these circumstances, the application - exhibit-35, is hereby dismissed."
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> (emphasis supplied)

7. This matter was heard for the entire second sitting on 12th August, 2004. Mr.Thakkar, learned Advocate appearing for some of the respondents, raised a preliminary objection about the `maintainability' of this Appeal From Order. Mr.Sharma did not address himself to the aspect of `maintainability of Appeal From Order'. At the end of his arguments, he requested that, in case, this Court is to hold that this Appeal From Order is not maintainable, then, the appellant may be permitted to convert this Appeal From Order into a substantive First Appeal.

Mr.Sharma did not point out as to how a substantive First Appeal will be maintainable against the order/s, which is/are challenged in this Appeal From Order.

8. In the cause title of `Appeal From Order', it is mentioned that:

> "Appeal from order Under Section.104 read with order 43 R.1(r) of the Code of Civil Procedure 1908"

Order 43 rule 1(r) reads as under:

> "an order under rule 1, rule 2, rule 2A, rule 4 or rule 10 or Order XXXIX;"

The fact that the orders under challenge are not passed under any of the provisions mentioned herein above and, therefore, the Appeal From Order is not maintainable.

9. There is a provision in Clause-(w) of r.1 of Order XLIII, which deals with an order passed in review, but then, it is only when the application for review is granted that the Appeal From Order is maintainable.

10. Section-104 of the Code of Civil Procedure provides for orders from which appeal lies.

Sub.section 1 of Section-104 provides - "An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders."

Clause-(i) of sub.section 1 of section-104 reads as under:

> "Any order made under rules from which an appeal is expressly allowed by rules."

A reference is required to be made to Order XVIII wherein in rule-(1) the orders against which the `Appeal From Order' lies are enlisted, of which Clauses (r) and (w) are discussed hereinabove. In view of the aforesaid clear position of law, it is held that this Appeal From Order is not maintainable.

11. In view of the fact that Mr.Sharma argued the matter at full length, relying upon various decisions and

invested considerable time, this Court does not find any reason to consider the request of Mr.Sharma allowing him to convert the Appeal From Order into a regular First Appeal, more so, when Mr.Sharma is not able to point out any provision under which a regular First Appeal is maintainable against the orders under challenge and hence, the request is rejected.

12. The matter is argued at length, hence, this Court deems it fit to deal with the arguments, which, in the considered opinion of this Court, are not only without any merit, but, are also irrelevant and hence, deserve to be dismissed with costs to convey a message that no party should take the Court for ride.

13. Few facts, which have weighed with the Court, are the decree was drawn on 7th March, 1986 and the decree reads as under:

> "(A) The plaintiff's suit for specific performance is decreed as under:-
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> (i) The plaintiff is directed to deposit in Court balance sale consideration in the sum of - Rs.49,400/- within four weeks hereof;
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> (ii) Within a week from the plaintiff depositing the balance consideration as directed, the defendant nos. 1, 4 and 5 are directed to apply before the Competent Authority for exemption and/or permission under section 20 of the Urban Land (Ceiling and Regulation) Act, 1976, failing which the learned Commissioner for Taking Accounts, appointed as Commissioner hereby, to apply before the Competent Authority for exemption and/or permission under section 20 of the Urban Land (Ceiling and Regulation) Act, for the purpose of selling right, title and interest of defendant 1, 5 and deceased Ramjibhai Nathabhai in the suit land in terms of suit agreement to sell read with purshis exh.149;
>
> (iii) Within a week from the exemption and/or permission being granted under section 20 of the Urban Land (Ceiling and Regulation) Act by the Competent Authority, defendants 1, 4 and 5 directed

to execute sale deed transferring the right, title and interest of defendants 1, 5 and deceased Ramjibhai in the suit land and defendants 1, 4, 5 and 8 are directed to hand over peaceful and vacant possession of the suit land to the plaintiff failing which the learned Commissioner for Taking Accounts, appointed as Commissioner hereby to execute the decree in terms of this clause.

(iv) Upon the sale deed being executed in terms of clause (iii) above, the balance consideration deposited in court by the plaintiff be paid over to the defendant no.1, 4 and 5;

(v) The cost of obtaining exemption or permission from the Competent Authority under the Act shall be borne by defendant nos.1, 4 and 5. The cost of the sale deed such as stamp, registration, drafting of document and the Commissioner's remuneration in this respect shall be borne by the plaintiff on one side and defendants 1, 4 and 5 on the other, in equal proportion.

(B) Upon the exemption or permission under section 20 of the Urban Land (Ceiling and Regulation) Act being refused, the amount of Rs.49,400/- being the balance consideration deposited by the plaintiff in the court under this decree shall be returned to the plaintiff and the defendants 1, 4 and 5 are directed to pay to the plaintiff Rs.41,450/- with running interest at the rate of 12 percent per annum from the date of the suit till realisation of such amount.

(C) So far as cost of this suit is concerned, defendants 1 and 5 on one side and defendant no.8 on the other side are directed to pay the costs of the plaintiff in equal proportion in one set. All the defendants are directed to bear their own costs.

The Darkhast is filed on 6th March, 1996.

Besides, there being no explanation for approaching the Court after a decade, the learned Advocate has not rendered any explanation. When enquired, the answer is that, as the period of limitation prescribed is of twelve years, there is no necessity for the appellant to mention any reason. It is true that the period of limitation, in which a party has to approach the Court for execution of a decree, is of twelve years. In substance, this is to mean that a Darkhast cannot be dismissed on that ground of having filed late if it is filed within the period of limitation, but then, the concerned Court can always take note of the fact that, `the judgement creditor-decree holder has approached the Court, after a decade and even on inquiry, the party is not able to render any explanation for approaching so late.

14. In the present case, the decree is in specific terms. The plaintiff was required to deposit the balance consideration within one week. Normally, it is for the judgement creditor to make an application for appointment of the Commissioner, but, the Court, taking into consideration the nature of the matter and urgency of the matter, appointed `the Commissioner for taking Accounts' as a `Commissioner'. Not only that, it is also provided that in the event, the judgement debtors nos.1, 4 and 5 do not apply before the Competent Authority for exemption and/or permission under Section-20 of the U.L.C. Act, the `Commissioner' was directed to apply before the Competent Authority. This shows that how urgent the matter was felt by the Court. In such an urgent matter, the appellant approached the Court for execution only after a decade. This raises a reasonable doubt about the bona fides of the judgement creditor. Besides, not disclosing the reason for such belated action can lead to infer without any difficulty that the judgement creditor delayed approaching the Court for execution of the decree for extraneous considerations.

15. Mr.Sharma, learned Advocate appearing for the appellant, has revealed, only after a query was made that the present appellant has filed Civil Suit No.5425 of 1995 against the society, which is joined as defendant no.8, in the Darkhast proceedings. He submitted that, the suit was filed, as the appellant came to know about the transfer of the right and interest in the suit land by defendant no.8 of the decree i.e. Shri Ambalal Shivlal Patel - proposer of New Praful Cooperative Housing Society Limited. It is required to be taken note of that the said Shri Ambalal Shivlal Patel expired in the year 1994. Despite the appellant having the knowledge of transfer of the right and interest in the

suit land in favour of the registered society, the appellant did not make any application for impleading the society in the Darkhast proceedings as a judgement debtor before joining him as defendant no.8 in the Darkhast proceedings and that too, without making any averment with regard to the registered society. The learned Judge, while passing Order dated 19th January, 1999, has recorded that, for all purposes, `registered society' is a stranger to the `Darkhast proceedings' as Darkhast is filed for execution of a decree wherein the registered society was not a party and hence, is not a judgement debtor. After passing of the decree and before filing of the Darkhast, there is no application by the judgement creditor-appellant, setting out reasons so as to relate the registered society with the proceedings. Therefore, it appeals to the logic that the learned Advocates at the time of passing of the order dated 19th January, 1999 agreed to move appropriate Court in the matter for seeking appropriate orders against the judgement debtor no.8 (Shri Ambalal Shivlal Patel), who, at the relevant time, was the `proposer' only. In Darkhast, the registered society is joined as a judgement debtor without any required application, which has come into existence in the meantime. The appellant, only with a view to abuse the process of law, after Order dated 19th January, 1999 was passed, did not move an appropriate Court by an application, seeking necessary orders in the matter. No reason is coming forward as to why instead of adopting the aforesaid course, to which the learned Advocates agreed to before the learned Judge at the time of passing of the order dated 19th January, 1999, a review application is filed and then, Orders dated 16th January, 1999 and 15th October, 1999 are challenged in this Appeal From Order, which is filed, only on 19th February, 2000.

It is equally important that despite the fact that the learned Judge has mentioned in his order dated 15th October, 1999 that, `the learned Advocates did concede at the time of passing of the order dated 19th January, 1999', no affidavit is filed either with Exh.36 or this Appeal From Order controverting the facts recorded by the learned Judge. It is a well settled position of law that, the Appellate Court is to go by the record of the case and the record of the case shows that the learned Advocates did fairly conceded before the learned Judge. It is only, thereafter, that for the reasons best known to the appellant and the learned Advocates, they did not adhere to their concession and decided to take a different course of action.

16. At this juncture, provisions of Section-50 and Order XXI r.22(1)(c) of the Code of Civil Procedure are required to be referred to. Section-50(1) of the Civil Procedure Code provides for,

> "Legal representative.--- (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased."
>
> (emphasis supplied)

Order-21, r.22(1)(c) provides that even an assignee against whom a decree is to be executed is required to be issued notice, calling upon such assignee - a party to show cause as to why the decree should not be executed against him.

17. In view of these two provisions, even on merits, the order dated 19th January, 1999 is absolutely just and proper. The appellant may choose not to make an application, not to take appropriate steps and join a stranger to Darkhast proceedings, but then, when it has come to the knowledge of the Court that a stranger is joined in Darkhast proceedings, the Court has rightly passed the order and, therefore, even on merits, this Court finds no substance in the Appeal From Order.

18. Mr.Sharma, learned Advocate, contended that as the possession of the land is with the registered society, the society was rightly joined as defendant no.8 in Darkhast proceedings; that after the arguments were over, subsequently, a question could not have been raised and the Court could not have passed the order dated 19th January, 1999. The learned Advocate submitted that after filing of the Darkhast, on 6th March, 1996, a notice was issued on 10th April, 1996 to defendant nos.1 to 8 under Order-21, r.34, and after that it was not open to any party to raise an objection about the non-joinder or misjoinder of a party. The learned Advocate also contended that the decree is not challenged by the registered society, even till date, no objection could have been raised in Darkhast proceedings and, therefore, Order dated 19th January, 1999 was not warranted. In the alternative, Mr.Sharma submitted that the notice issued by the executing court on 10th April, 1996 should be held to be a sufficient compliance of all the required provisions and in view of the notice issued on 10th April, 1996, which was served to the registered society

also, there was no reason for anybody to raise an objection about the misjoinder of party. That being so, there was no question of passing any order on such objection. It was strenuously submitted that a person, who is not even a judgement debtor, but a real beneficiary by way of an assignment, is required to be issued notice and notice dated 10th April, 1996 was such notice and, therefore, there was no question of recalling the same. He further contended that defendant no.8 had been representing the interest of the registered society and it was the registered society to whom the right and interest in the land were transferred; that the notice issued by the executing court on 10th April, 1996 was sufficient notice and there was no need to recall that order. Lastly, Mr.Sharma submitted that assuming that there was some defect in the Darkhast form, the same cannot be held to be a factual defect and the Court should have proceeded further against the registered society. Mr.Sharma relied upon the following decisions of the Apex Court as well as other Courts.

(i) 2000 A.I.H.C. 502 (Mahaveer Uchcha Prathmik Vidhyalaya v. Babu Lal;

(ii) AIR 1965 SC 414 (Anand Nivas Private Ltd. vs. Anandji Kalyanji's Pedhi & Ors.;

(iii) AIR 1996 BOMBAY 296 (Prataprai Trambaklal Mehta v. Jayant Nemchand Shah & Ors.; and,

(iv) AIR 1994 ALLAHABAD 167 (Abdul Aziz & Ors. vs. District Judge, Rampur & Anr.).

This Court does not find any of the submissions worth accepting in view of the discussion hereinabove. The Court also does not find that any of these decisions have application to the facts of the present case.

19. In the considered opinion of this Court, this is a case wherein the appellant has been abusing the process of law. Hence, the Appeal From Order is dismissed, saddling the appellant with exemplary costs of Rs.25,000=00 for abusing the process of law. The appellant shall deposit this costs before this Court before any other proceedings are taken out by the appellant.

(Ravi R. Tripathi, J.)

kamlesh*